

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CRISTIAN GARCIA,

Plaintiff

v.

SPARKS POLICE DEPARTMENT
OFFICER J. TAVCAR, et al.,

Defendants

Case No.: 3:23-cv-00308-ART-CSD

Order

Re: ECF Nos. 1. 1-1

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)

(quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee; therefore, the application is granted.

II. SCREENING

A. Standard

“[T]he court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less

1 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
2 (1980) (internal quotation marks and citation omitted).

3 A complaint must contain more than a “formulaic recitation of the elements of a cause of
4 action,” it must contain factual allegations sufficient to “raise a right to relief above the
5 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
6 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
7 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
8 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
9 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the
11 complaint that the action is frivolous and could not be amended to state a federal claim, or the
12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
13 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

14 **B. Plaintiff’s Complaint**

15 Plaintiff’s complaint names as defendants Sparks Police Officers J. Tavcar, Eddie, and
16 John Doe #2. He alleges that on June 10, 2023, he went to the scene, and told officers he was his
17 sister’s ride. He alleges officers yelled at him, stating he was obstructing as he waited by his car.
18 His sister’s ex-boyfriend came out, and he asked how it was going and he pointed to his car, and
19 Plaintiff responded, “that[’s] messed up” and indicated he was leaving. At that point, Officer J.
20 Tavcar and John Doe #2 came and attacked him while he was trying to leave by slamming him to
21 the ground. They left his phone and arrested Plaintiff. He includes as exhibits to his complaint
22 photos of abrasions on his body.

1 complaint correcting the deficiencies noted above with respect to Officer Eddie. The amended
2 complaint must be complete in and of itself without referring or incorporating by reference any
3 previous complaint. Any allegations, parties, or requests for relief from a prior complaint that are
4 not carried forwarded in the amended complaint will no longer be before the court. Plaintiff shall
5 clearly denote that the complaint is his amended complaint. If Plaintiff fails to file an amended
6 complaint within the 30 days, the action will proceed only with the Fourth Amendment excessive
7 force claim against Officer Tavcar and John Doe #2 (once identified).

8 (5) The Clerk of Court shall **ISSUE** a summons for Officer Tavcar, **and deliver the**
9 **same**, to the U.S. Marshal for service. The Clerk also shall also **SEND** a copy of the complaint
10 and this Order to the U.S. Marshal for service on the Officer Tavcar. The Clerk shall **SEND** to
11 Plaintiff a USM-285 form. Plaintiff has **21 days** within which to furnish to the U.S. Marshal the
12 completed USM-285 form with relevant information for Officer Tavcar. The completed form can
13 be sent to the U.S. Marshal at 400 S. Virginia Street, 2nd floor, Reno, Nevada 89501. Within
14 **twenty (20) days** after receiving from the U.S. Marshal a copy of the USM-285 forms showing
15 whether service has been accomplished, if the defendant was not served, and if Plaintiff wants
16 service to be attempted again, he must file a motion with the court providing a more detailed
17 name and/or address for service, or indicating that some other method of service should be
18 attempted.

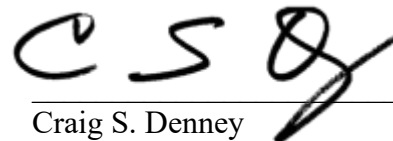
19 (6) Under Federal Rule of Civil Procedure 4(m), service must be completed within **90**
20 **days** of the date of this Order. If Plaintiff requires additional time to meet any of the deadlines
21 set by the court, he must file a motion for extension of time under Local Rule 1A 6-1 *before* the
22 expiration of the deadline, and the motion must be supported by a showing of good cause. A
23

1 motion filed after a deadline set by the court or applicable rules will be denied absent a showing
2 of excusable neglect.

3 (7) Once a defendant is served, Plaintiff must serve a copy of every pleading or other
4 document submitted for consideration by the court upon the defendant or, if an appearance has
5 been entered by counsel, upon the attorney. Plaintiff must include with the original of each
6 document to be filed with the court a certificate stating that a true and correct copy of the
7 document was served on the defendant, or counsel, if the defendant has an attorney. Under Local
8 Rule 5-1 the proof of service must show the day and manner of service and the name of the
9 person served. The court may disregard any paper received which has not been filed with the
10 Clerk, or that fails to include a certificate of service.

11
12 **IT IS SO ORDERED.**

13
14 Dated: August 8, 2023



Craig S. Denney
United States Magistrate Judge